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Public Prosecutor v Taza bin Tarji & Anor

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HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45A-03–02 OF 2017
COLLIN SEQUERAH J
16 MAY 2018

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Criminal Law — Dangerous Drugs — Section 39B(2A) — Whether alternative penalty of life imprisonment plus 15 strokes of whipping upon conviction for drug trafficking could be imposed only if conditions stated in paras (a)–(d) of s (2A) were satisfied — Whether para (d), that the convicted person assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia was mandatory — Whether without fulfillment of the condition in para (d) court had no choice but to hand down the death penalty

D

Marine police patrolling the sea off the coast of Johor found both the accused alone on a small boat ('sampan') fitted with an outboard motor one evening in September 2016. On boarding the *sampan* to carry out a random check, the police found a bag ('the bag') at the front of the *sampan* containing food and drink and also plastic packets suspected to contain dangerous drugs. The packets were later verified to contain 5,496g of methamphetamine. At the joint trial of both accused for trafficking in the drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), prosecution witnesses testified that the accused rented the *sampan* at about 7.30am on the day in question to go fishing. Both the owner of the *sampan* and the person who rented it out to the accused said they had never seen the bag before and that the *sampan* was empty when it was rented out. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case. Inter alia, the court inferred that since both the accused were physically so close to the bag for about nine hours on the boat before they were arrested, they must have known of its presence and what it contained and were therefore in possession of the drug. Given the quantity of the drug seized, the court invoked the presumption of trafficking under s 37(da) of the DDA. In their defence, the accused said they never knew about the existence of the bag (until much later shortly before the marine police arrived) or of its contents. Prior to the amendment to s 39B of the DDA by the Dangerous Drugs (Amendment) Act 2017, which came into effect on 15 March 2018, a person convicted for drug trafficking faced the mandatory penalty of death. Following the amendment, the court could, alternatively, sentence the convicted person to life imprisonment plus whipping of 15 strokes provided certain conditions set out in s 39B(2A)(a)–(d) were satisfied.

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Held, convicting both accused as charged and sentencing them to death:

(1) From the photographs, the *sampan* appeared to be only about ten to 12 feet long and four feet wide. It was improbable that neither accused noticed the bag during the many hours they spent on the boat and with such limited space on board. They contended that when they did notice the bag much later, they ignored it assuming that it belonged to someone else. But neither of the accused said so to the police during the investigations. The justifiable conclusion from this omission to reveal, without being prompted or asked, matters of such importance and therefore central to their defence, was that the defence was a mere afterthought. If what they contended was true, any reasonable person on learning that the bag contained illicit drugs would have at the very first opportunity alerted the police to that fact and distanced themselves from any involvement with or knowledge of the drugs. All the circumstances pointed to the accused having had possession and knowledge of the bag and the drugs that were in it and raised the inference that they were on the boat for a sinister purpose, ie, to traffick in the drug (see paras 103–104, 118, 120, 123, 128 & 130–131).

(2) The accused failed to rebut on balance of probabilities the statutory presumption of trafficking under s 37(da) of the DDA. They also failed to raise a reasonable doubt as to possession of the impugned drugs (see paras 132–133).

(3) A plain reading of sub-s (2A) of the amended s 39B of the DDA indicated that paras (a)–(c) had to be read disjunctively whilst paras (d) had to be read conjunctively with either of the requirements in (a)–(c). The requirement under para (d) — 'that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia' was mandatory. The phrase 'only' in the opening words of sub-s (2A) meant the court could only consider the matters enumerated in paras (a)–(d) in deciding whether to exercise discretion. The *Hansard* reinforced this view. There was nothing in the evidence in the instant case to suggest the requirement under para (d) was satisfied. Hence, there was no material upon which the court could exercise its discretion. Both accused were therefore sentenced to death (see paras 135, 146–148 & 150).

[Bahasa Malaysia summary

Polis marin yang meronda di laut di pesisir Johor mendapati kedua-dua tertuduh bersendirian dalam sebuah bot kecil ('sampan') yang dipasang dengan motor sangkut satu petang pada September 2016. Semasa menaiki sampan untuk melakukan pemeriksaan secara rawak, pihak polis menjumpai beg ('beg') di hadapan sampan yang mengandungi makanan dan minuman dan juga paket-paket plastik yang disyaki mengandungi dadah berbahaya.

Paket-paket tersebut kemudiannya disahkan mengandungi 5,496g methamphetamine. Dalam perbicaraan bersama kedua-dua tertuduh untuk pengedaran dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), saksi pendakwaan memberi keterangan bahawa tertuduh menyewa sampan kira-kira pukul 7.30 pagi pada hari yang dipersoalkan untuk pergi memancing. Kedua-dua pemilik sampan dan orang yang menyewakannya kepada tertuduh berkata mereka tidak pernah melihat beg tersebut sebelum itu dan sampan itu kosong apabila ia disewa. Pada akhir kes pendakwaan, mahkamah perbicaraan mendapati pendakwaan telah membuktikan kes prima facie. Antara lain, mahkamah membuat kesimpulan bahawa kerana kedua-dua tertuduh secara fizikal begitu dekat dengan beg selama kira-kira sembilan jam dalam sampan itu sebelum mereka ditangkap, mereka semestinya mengetahui tentang kewujudannya dan apa yang terkandung dalamnya dan oleh itu memiliki dadah tersebut. Berdasarkan kuantiti dadah yang dirampas, mahkamah mengguna pakai anggapan pengedaran di bawah s 37(da) ADB. Dalam pembelaan mereka, tertuduh mengatakan mereka tidak pernah mengetahui tentang kewujudan beg tersebut (sehingga ltidak lama kemudian sebelum polis marin tiba) atau kandungannya. Sebelum pindaan kepada 39B ADB dengan Akta Dadah Berbahaya (Pindaan) 2017, yang berkuat kuasa pada 15 Mac 2018, seseorang yang disabitkan dengan pengedaran dadah yang menghadapi hukuman mati mandatori. Berikutan pindaan itu, mahkamah boleh, secara alternatif, menjatuhkan hukuman ke atas orang yang disabitkan kepada penjara seumur hidup ditambah dengan 15 sebatan rotan dengan syarat-syarat tertentu yang dinyatakan dalam s 39B(2A)(a)–(d) telah dipenuhi.

Diputuskan, mensabitkan kedua-dua tertuduh sepertimana didakwa dan menjatuhkan hukuman mati ke atas mereka:

(1) Berdasarkan gambar-gambar, sampan itu kelihatan hanya sekitar sepuluh hingga 12 kaki panjang dan lebar empat kaki. Tidak mungkin kedua-dua tertuduh tidak menyedari beg tersebut selama berjam-jam mereka berada di atas bot tersebut dan dengan ruang yang terhad di atasnya. Mereka menegaskan bahawa apabila mereka menyedari beg tersebut kemudiannya, mereka tidak menghiraukannya dengan beranggapan ia milik orang lain. Namun begitu kedua-dua tertuduh tidak berkata demikian kepada polis semasa siasatan. Kesimpulan yang wajar dari kelalaian ini untuk mendedahkan, tanpa diminta atau ditanya, perkara-perkara yang penting sebegini dan oleh sebab itu penting untuk pembelaan mereka, adalah bahawa pembelaan itu adalah suatu yang telah difikirkannnya kemudian. Jika apa yang dipertikaikan adalah benar, mana-mana orang yang munasabah apabila mengetahui bahawa beg itu mengandungi dadah haram akan apabila mendapat peluang pertama memberitahu kepada polis tentang fakta itu dan menjauhkan diri daripada sebarang penglibatan atau pengetahuan tentang dadah. Semua keadaan menunjuk kepada tertuduh mempunyai milikan dan

pengetahuan tentang beg tersebut dan dadah yang ada di dalamnya dan menimbulkan kesimpulan bahawa mereka berada di atas bot tersebut untuk tujuan jahat, iaitu, untuk mengedar dadah (lihat perenggan 103–104, 118, 120, 123, 128 & 130–131).

(2) Tertuduh gagal mematahkan atas imbangan kebarangkalian anggapan statutori berhubung pengedaran di bawah s 37(da) ADB. Mereka juga gagal menimbulkan keraguan munasabah tentang milikan dadah yang dipersoalkan (lihat perenggan 132–133).

(3) Pembacaan biasa sub-s (2A) pindaan s 39B ADB menunjukkan bahawa perenggan (a)–(c) harus dibaca secara berasingan manakala perenggan (d) dibaca secara bersama dengan salah satu keperluan dalam (a)–(c). Keperluan di bawah perenggan (d) — 'that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia' adalah mandatori. Ungkapan 'only' dalam kata-kata pembukaan sub-s (2A) bermakna mahkamah hanya boleh mempertimbangkan perkara-perkara yang disebutkan dalam perenggan (a)–(d) dalam memutuskan sama ada untuk menggunakan budi bicara. *Hansard* memperkuatkan pandangan ini. Tidak ada apa-apa dalam keterangan dalam kes ini untuk mencadangkan keperluan di bawah perenggan (d) telah dipenuhi. Justeru, tidak ada apa yang material untuk mahkamah boleh melaksanakan budi bicaranya. Oleh itu, kedua-dua tertuduh telah dihukum mati (lihat perenggan 135, 146–148 & 150).]

Notes

For cases on dangerous drugs, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 308–1075.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)
Ibe Godwin Uzochukwu v PP [2017] MLJU 202, CA (refd)
Khalil Anuar bin Sukirman v Pendakwa Raya [2011] MLJU 1011; [2012] 1 CLJ 848, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325, FC (refd)
Lim Son Heng v PP [2014] 6 MLJ 109, CA (refd)
Loh Kah Loon v PP [2011] 4 MLJ 260; [2011] 5 CLJ 345, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Md Zainudin bin Raujan v PP [2013] 3 MLJ 773, FC (refd)
Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ Rep 221, SC (refd)

Neo Koon Cheo v Reg [1959] 1 MLJ 47 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
Prasit Punyang v PP [2014] 4 MLJ 282, CA (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194, FC (refd)
PP v Kau Joo Huat [1988] 2 MLJ 91, SC (folld)
PP v Lam San [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)
Suresh v State of Uttar Pradesh AIR 2001 SC 1344, SC (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)
Toh Ah Loh And Mak Thim v Rex [1949] 1 MLJ 54 (refd)

Legislation referred to

Criminal Procedure Code ss 180(1), 182A
Dangerous Drugs Act 1952 ss 37(d), (da), (da)(xvi), 39B, 39B(1)(a), (2A), (2A)(a), (2A)(b), (2A)(c), (2A)(d), First Schedule
Evidence Act 1950 s 8

Lydiana Mansor (Shaik Saleem with her) (Lydiana Law Chambers) for the first accused.
Haffiirrudin Osman (Mohamad Azrulsani with him) (Haffirrudin Osman & Co) for the second accused.
Nor Iffa Zarilla bt Abd Rahman (Deputy Public Prosecutor, Johor Legal Advisor's Officer) for the respondent.

Collin Sequerah J:

INTRODUCTION

[1] Both accused were charged with an amended charge as follows:

> Bahawa kamu bersama-sama pada 27 September 2016 jam lebih kurang 4.15 petang, di atas sampan fiber warna merah biru nombor pendaftaran JHS 3153 B lokasi di perairan Tanjung Piai Pontian di kedudukan Latitude 01°15 .899 'N, Longitude 103° 31.849 'E jarak lebih kurang 1.1 NM dari Tanjung Piai Pontian, dalam daerah Pontian, dalam Negeri Johor Darul Takzim telah didapati mengedar dadah berbahaya jenis Methamphetamine seberat bersih 5496 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B (1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

A PERTINENT FACTS OF THE PROSECUTION CASE

[2] The salient facts adduced by the prosecution revealed that on 27 September 2016 at about 4.15pm, SP2, his team and the captain of Patrol Boat RH13 were on patrol around the sea near the area of Tanjung Piai, Pontian until the area known as Minyak Beku, Batu Pahat, Johor. While on patrol there they detained a fiberglass boat ('sampan') with an outboard motor at the area around 1.1 nautical miles from Tanjung Piai, Pontian.

[3] There were two Malay males in the sampan at the time who were the first and second accused respectively. According to SP2, an observation was carried out on the sampan beforehand for around 20–30 minutes.

[4] After the sampan was detained, SP2 and his team carried out a random search and found a camouflaged bag ('bag celoreng') in the front of the said sampan and marked ('X') in exh P5(G). According to SP2 when he conducted an examination of the said bag, it felt heavy.

[5] Further examination revealed the bag P11(1) contained various packets of food and drink which appeared to have been repackaged with some newspaper and transparent plastic packets and containing crystal like substances suspected to be dangerous drugs.

[6] These packages and their contents containing dangerous drugs were marked as exhs P11(1)(a), P11(1)(a)(1), P11(1)(a)(2), P11(1)(b), P11(1)(b)(1), P11(1)(b)(2), P11(1)(c), P11(1)(c)(1), P11(1)(c)(2), P11(1)(d), P11(1)(d)(1), 11(1)(d)(2), P11(1)(e), P11(1)(e)(1), P11(1)(e)(2), P11(1)(f), P11(1)(f)(1), P11(1)(f)(2), P11(1)(g), P11(1)(g)(1), P11(1)(g)(2), P11(1)(h), P11(1)(h), P11(1)(h)(1) and P11(1)(h)(2) respectively.

[7] Both the accused at the time the sampan was detained were said to be either preparing to fish or were in the act of fishing. This apparent discrepancy will be addressed later.

[8] Both accused were also said to have had a neutral reaction when detained. There was no one else in the sampan except for the accused persons.

[9] SP3 who was the owner of the sampan testified that about a year before the arrest, the sampan was handed over to her brother-in-law ('SP4') to be used to go out to sea. SP3 said that she had never seen the contents found in the said bag.

[10] SP4 testified that the outboard motor ('P18') belonged to him while the sampan ('P17') belonged to SP3, his sister-in-law. SP4 said that he had rented the said sampan to both accused on 27 September 2016 at around 7.30am.

[11] According to SP4, on 26 September 2016 at night, he received a phone call from the first accused informing that the latter intended to rent the sampan for fishing.

[12] At around 7.30am, on 27 September 2016, the first and second accused came to SP4's house and SP4 handed over the key to the sampan and petrol to both of them. The rental for the sampan was RM120 from 7am–7pm.

[13] All the exhibits containing the dangerous drugs were duly seized and brought back together with the two accused to the IPD Pontian. At IPD Pontian, SP2 did a search list, marked the exhibits, weighed the exhibits, lodged a police report Permas 1194/16 and duly handed the exhibits and the accused persons to the investigating officer (IO), SP6.

Before handing over the exhibits to SP6, SP2 had control of the exhibits with him at all times. The sampan however was under the care and control of the Marine police.

[14] SP6 kept the exhibits in his office in a locked cupboard to which only he kept the key and had access to. On 29 September 2016, at around 12.34pm, SP6 handed over the drug exhibits to the chemist ('SP5') for analysis.

[15] The chemist ('SP5') testified that she received all the exhibits containing the dangerous drugs from SP6 on 29 September 2016 at around 12.34pm for analysis.

[16] SP6 received back the drug exhibits after analysis from SP5 on 5 December 2016 at around 2.25pm. On 6 December 2016, SP6 placed and registered the drug exhibits at the exhibits store by handing it over to SP1.

[17] The results of the analysis done by SP5 confirmed that all the drugs seized contained methamphetamine weighing a total of 5,496g nett.

DUTY OF COURT AT THE END OF THE PROSECUTION CASE

[18] The duty of the court at the end of the prosecution case is set out in s 180(1) of the Criminal Procedure Code ('the CPC') which stipulates that when the case for the prosecution is concluded the court shall consider whether the prosecution has made out a prima facie case against the accused.

[19] The cases of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203 respectively lay down the proposition that at the end of the case for the prosecution, their evidence must be subject to maximum evaluation in order to determine whether a prima facie case is made out.

[20] In *Looi Kow Chai v Public Prosecutor,* the Court of Appeal held:

> It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. *He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.* (Emphasis added.)

ANALYSIS OF THE PROSECUTION CASE

[21] In order for the prosecution to make out a prima facie case against the accused persons in respect of the charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), they must prove the following ingredients:

(a) the drugs were in the possession of the accused persons;

(b) the drugs are listed as dangerous drugs in the First Schedule in the DDA; and

(c) the accused persons were trafficking in the said dangerous drugs.

The accused persons were in possession of the dangerous drugs

[22] Possession can be either actual or presumed. Presumed possession and knowledge is upon the invocation of s 37(d) of the DDA by proof of custody or control.

[23] Possession has nowhere been statutorily defined. One has therefore to resort to case law in order to determine the legal meaning of possession. In *Toh Ah Loh And Mak Thim v Rex* [1949] 1 MLJ 54, the court observed:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the thing.

[24] However, following the decision in *Public Prosecutor v Kau Joo Huat*

[1988] 2 MLJ 91, the power of disposal is no longer an ingredient to support a conviction in a case involving dangerous drugs.

[25] The requirement of the possessor to have knowledge of the thing possessed however, is still an essential ingredient of possession. In *Leow Nghee Lim v Reg* [1956] 1 MLJ 28, the phrases custody, control and possession was explained as follows:

> *Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else*. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.
>
> *Control must be proved as a fact and it must arise from the relation of the person to the goods*, irrespective of whether they are contraband.
>
> *Probably the most helpful definition of possession is:*
>
> > *The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.*
>
> This definition does not express, but it does imply that the meaning of the word includes some element of knowledge.
>
> *A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies some knowledge but not necessarily full or exact knowledge*. (Emphasis added.)

[26] In *Neo Koon Cheo v Reg* [1959] 1 MLJ 47, the phrases custody, control and possession were discussed as follows:

> What does the word 'custody' mean? According to the view expressed by Brown Ag CJ, in *Ho Seng Seng v Rex* [1951] 1 MLJ 225, it means watching over or keeping safe. With great respect to the learned judge, I am unable to agree with his view that the difference between 'control' and 'custody' is that 'control' implies a power of disposal while 'custody' does not.
>
> I have given the most careful consideration to the meaning of the word 'custody' in s 37(d) of the Ordinance under consideration and have come to the conclusion that it means actual physical control. The word 'control' in the same section must, therefore, be construed to mean any form of control other than actual physical control. Other names for 'custody' are 'physical possession,' 'de facto possession' and 'detention'. It is referred to in 25 *Halsbury's Laws* (2nd Ed) 194, para 327, in these terms:
>
> > *The word 'possession' may mean effective, physical or manual control, or occupation, evidenced by some outward act, sometimes called de facto possession or detention.*
>
> *I would adopt the following definitions of 'custody' and 'possession' given by the eminent American jurist, Roscoe Pound, in his 'Introduction to American Law':*

Custody is a mere condition of fact, a mere physical holding of or physical control over the thing.

Where custody (exercised by oneself or by another) is coupled with the mental element of holding for one's own purposes, there is possession.

Support for my view that 'custody' means actual physical control is to be found in Regulation 6(2)(b) of the Dangerous Drugs Regulations, 1951, which provides as follows:

For the purposes of these Regulations: — a person shall be deemed to be in possession of a drug or preparation if it is in his actual custody or is held by any other person subject to his control or for him or on his behalf.

From this it follows that under this Regulation a drug is in a person's actual custody if it is held by him and not by someone else, i.e. if it is in his actual physical control. (Emphasis added.)

[27] In *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237, possession was defined in the following terms:

Possession' itself as regards the criminal law is described as follows in Stephen's Digest (9th Ed, p 304):

A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. *The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the Court that the person who is*

physically in a position to deal with the thing as his own had the intention of doing so. (Emphasis added.)

[28] From a distillation of these authorities, custody is having care of goods on behalf of another person by physical holding.

[29] Control must be proved and must arise from the relation of the person to the goods.

[30] Possession means that a person is so situated with respect to a thing that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. This implies both a physical and a mental element.

[31] As said in *Chan Pean Leon v Public Prosecutor,* such intention to deal with the drugs as owner to the exclusion of all other persons is a matter of fact which in the nature of things cannot be proved by direct evidence and can only be proved by inference from the surrounding circumstances.

[32] Bearing in mind the above definition of the various phrases of custody, control and possession, it is now apposite to examine the facts of the case in order to determine whether the accused persons were in possession of the impugned drugs.

[33] With regard to the essential element of knowledge, in the absence of an admission on the part of the accused, this cannot be proved by direct evidence but by way of inference from the facts and circumstances.

[34] The boat or 'sampan' in which the two accused were arrested was spotted right in the middle of the sea. Both the accused were said to be either about to fish or in the act of fishing.

[35] Learned counsel for the first accused submitted that there was a contradiction in the testimony of SP2 when he mentioned in his police report ('P12') that during the raid, the accused persons were fishing while in examination-in-chief he said that they were about to fish.

[36] I do not however find that the apparent contradiction about whether the accused persons were about to fish or were in the act of fishing to be material. This is because it is not in dispute that both accused were found in a boat in the sea with a bag on board containing dangerous drugs. What is material is whether under the circumstances, possession on their part has been established.

A **[37]** Both accused were the only ones in the sampan at the time of arrest. The bag containing the drugs were found in the front part of the boat. There were no other boats in the vicinity or nearby.

B **[38]** Both SP3 and SP4 testified that they had never before seen the drugs. When SP4 handed the sampan over to the accused, he said that there were no other things in it and it was empty. Both SP3 and SP4 also said that they had never before seen the said bag.

C **[39]** The sampan was not a large vessel by any means. As the bag was at the front part of the boat, it is unlikely that the bag was not noticeable to both accused. Both the accused were also physically close or proximate to the drugs.

[40] Both the accused were also in the sampan from 7.30am until their arrest
D at 4.15pm, a period of almost eight or nine hours and it is not reasonable to suppose that they would not have noticed the presence of the bag containing the drugs for that span of time.

E **[41]** Evidence was also adduced that the said bag was not totally concealed beneath the life jacket but only partially concealed. Given the span of time the accused spent time in the sampan before their arrest, it is unreasonable to conclude that they did not notice the said bag.

F **[42]** It is also pertinent that besides the said bag, the accused were found to be carrying no other bags. The fact that the reaction of the accused was said to neutral 'bersahaja' does not of itself mean that no inference of knowledge of the offending exhibits can be made. The neutral reaction of the accused persons could also be due to many other factors.

G

[43] It is pure common sense that knowledge cannot be proved by direct evidence in the absence of a confession or an admission. Knowledge therefore has to be inferred from the circumstances of a particular case. A consideration of the above circumstances entitle the inference of knowledge of the existence
H of the impugned drugs to be made on the part of the accused.

[44] When SP2 conducted an examination on the bag, he said that he found it to be heavy. Given that it is inconceivable that the accused persons could have failed to notice the said bag, the fact that the bag was heavy also entitles the
I inference to be made that the accused had knowledge that the bag contained more than just packaged food and drink.

[45] The fact that the drugs were wrapped up and not visible through the packaging cannot not by itself mean that this will negate knowledge on the part

of the accused persons for otherwise it would result in a ridiculous situation where drug traffickers could escape accountability merely by wrapping the drugs in opaque wrapping.

[46] In the Federal Court case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1, it was held:

> *We further agree with the prosecution that the fact that the drug was found wrapped in newspaper is no ground for saying that an inference could not be drawn against the respondent that he had the requisite knowledge*. In this regard it is pertinent to refer to the observation of the Singapore Court of Appeal in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 at p 639:
>
> > For the element of 'possession' (within the meaning of s 17 of the Misuse of Drugs Act) to be established, it must not only be shown that the accused had physical control of the drugs at the relevant time; the prosecution must also prove that the accused possessed the requisite knowledge as to the contents of what he was carrying: see *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 49; [1978–1979] SLR 211. *In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.*
>
> *We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible*. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438):
>
> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses. (Emphasis added.)

[47] The obvious proximity of the accused persons to the said bag containing the impugned drugs raised the inference that they had the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do in case of need (see *Khalil Anuar bin Sukirman v Pendakwa Raya* [2011] MLJU 1011; [2012] 1 CLJ 848, *Chan Pean Leon v Public Prosecutor* and *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194).

[48] Put another way, the accused persons were so situated with respect to the bag that they had the ability to deal with it as owner to the exclusion of all other persons.

[49] I find therefore that the accused persons were in actual as opposed to presumed possession of the drugs in the said bag.

The drugs are listed as dangerous drugs in the First Schedule in the DDA

[50] The chemist, Liew Chyi ('SP5') testified that the results of her analysis of the exhibits she received from SP6 confirmed that they contained the drug methamphetamine weighing 5,496g nett.

[51] SP5 also confirmed that the drugs were dangerous drugs and listed in the First Schedule to the DDA.

[52] The cases of *Public Prosecutor v Lam San* [1991] 3 MLJ 426; [1991] 1 CLJ Rep 391, *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ Rep 221 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 respectively all held that the court is entitled to accept the testimony of the chemist at face value without the necessity of him or her going into the details of their analysis.

[53] I therefore find that the prosecution had proven the nature and weight of the impugned drugs forming the subject matter of the charge.

The defence submitted that there existed a discrepancy in the weight of the drugs during the time of the arrest, after its receipt by the investigating officer, and when weighed by the chemist.

[54] The discrepancy however can be explained by the fact that SP2 and SP6 testified that the drugs were weighed using a weighing scale supplied by the PDRM which was not calibrated. On the other hand, SP5 utilised a weighing scale supplied by the Chemist Department which was calibrated.

[55] This then was sufficient to explain the discrepancy in weight. This explanation clearly accounted for the difference in the gross weights.

[56] In *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636, the Federal Court held:

> At this juncture, we might hasten to also add that *the weighing process by the police is not the determining factor in the weight of the drugs, rather it is the weighing done by the chemist which determines the actual weight of the drugs and forms the basis of the charge*. It is common knowledge that *the weighing process undertaken by the police after the*

seizure of the drugs is only for classification purposes in the determination of the charge that will be most likely to be preferred against the accused and/or arrested person. More often than not *the disparity in weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatus used by the police force and the chemist department*. (Emphasis added.)

[57] In *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325, the Federal Court held as follows:

Accordingly in the present case, we would say that *discrepancies in weight alone of an exhibit such as drug should not ipso facto cast doubt on its identity*. There are other primary factors to consider such as the facts and/or events that form the foundation for its admission as a piece of evidence. *One fact and/or event to consider is whether there is any break in the handling or custody, which tantamount to a break in the chain of evidence. If such event occurred then that should cast a doubt in the exhibit as a reliable and trustworthy piece of evidence*. (Emphasis added.)

[58] See also *Loh Kah Loon v Public Prosecutor* [2011] 4 MLJ 260; [2011] 5 CLJ 345.

[59] It is thus clear that mere discrepancy in the weight of drugs does not necessarily cast doubt as to its identity.

[60] Learned counsel for the first accused also submitted that there was a discrepancy regarding the time frame when the investigating officer ('SP6') received the exhibits and the accused. It was submitted that while SP2 said that he handed over the exhibits before 7pm at the Marine base (Pengkalan Marin), SP6 said that she received the exhibits at 10pm at IPD Pontian.

[61] Although SP2 said that he handed the exhibits to SP6 at around ('lebih kurang') 7pm, a perusal of the testimony of SP6 clearly indicates that she received the exhibits at IPD Pontian after all the documentation was concluded.

[62] What is important is the fact that SP6 confirmed she received the drug exhibits from SP2 himself at the IPD Pontian. This fact is further supported by the handover of exhibits document 'Borang Akuan Serah Menyerah' exh P16 signed by both SP2 and SP6.

[63] I was therefore satisfied that there was no break in the chain of drug exhibits from the time they were seized until it was brought to court.

[64] On the facts of the case, I was satisfied that the drugs seized were the very same ones produced in court and identified by the relevant witnesses.

The accused persons were trafficking in the said dangerous drugs

[65] Both accused stand charged for trafficking in 5,496g of methamphetamine. Section 37(da) of the DDA reads:

> 37 Presumptions
>
> In all proceedings under this Act or any regulation made thereunder —
>
> ...
>
> (da) any person who is found in possession of —
>
> (xvi) 50 grammes or more in weight of Methamphetamine
>
> ...
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

[66] An undertaking of an analysis of the facts as adduced by the prosecution showed that both accused were proven to have possession of the impugned drugs.

[67] As the weight of the drugs of the type methamphetamine is 5,496g nett and therefore exceeds the statutory minimum in s 37(da) of the DDA, I find that the statutory presumption of trafficking has arisen against both accused.

[68] It was now incumbent on the accused persons to rebut such presumption on a balance of probabilities. See *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89.

Common intention

[69] The essence of the concept of common intention was explained in the Court of Appeal case of *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37 by referring to what was said by Sethi J in the Indian case of *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344 as follows:

> Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. *It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually*. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. *Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question*

of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (Emphasis added.)

[70] The above passage can succinctly be summarised as follows:

(a) it is the application of the principle of vicarious liability in criminal law;

(b) it is a rule of evidence;

(c) it is the recognition of the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually;

(d) it pre-supposes prior concert;

(e) this however can not only be formed previously but also during the course of occurrence and on a spur of moment; and

(f) whether there is common intention is a question of fact to be proved mainly by way of inference from circumstances.

[71] The circumstances of the case reveal that both accused had gone to SP3's house to hire a boat. Observation and surveillance conducted by SP2 for a period of 20–30 minutes reveal that only both accused were in the boat.

[72] The bag containing the impugned drugs was in close proximity to both accused for a length of time that made it not probable for them not to have seen the said bag earlier. The boat was also not big and the confined space would make it highly unlikely that both accused could have failed to notice the said bag.

[73] The inferences drawn from the above circumstances was that there was common intention of both accused to traffic in the said drugs.

Absence of DNA/fingerprint on drugs

[74] The mere absence of the both accused's DNA/finger prints on the drugs does not mean that they were not in possession of the drugs.

This was illustrated in the Court of Appeal case of *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 as follows:

> *It was submitted that there was no nexus between the appellants and the drug*. Even though the packets containing the drug were sent to PW7 for finger printing impression, *no finger printing impression sufficient for analysis could be lifted. Hand swaps and nail clippings were not taken*.
>
> *In my view, such evidence, if any, would add to other available evidence of possession. Without it, it does not necessarily mean that possession is not proved*. In view of what I

have said earlier regarding proof of possession as found by the learned judge on the facts and in the circumstances of this case, the inability to lift sufficient finger print impressions from the packets for analysis and the failure to take hand swaps and finger nail clippings does not in any way affect that finding of possession by the learned judge. This ground too fails. (Emphasis added.)

[75] In *Lim Son Heng v Public Prosecutor* [2014] 6 MLJ 109, it was held:

On the issue of fingerprints and DNA tests, we agree with the arguments of the learned DPP that the negative results of the tests had no bearing on the issue of possession of the drugs considering that, as we have said earlier, the appellant had enjoyed complete custody and control of the premises and thereby had the exclusive power to deal with the drugs in question.

[76] DNA and finger print evidence is not substantive evidence and only corroborative in nature and the absence of it does not in any way cause a gap in the prosecution's case as decided in the case of Court of Appeal, *Ibe Godwin Uzochukwu v Public Prosecutor* [2017] MLJU 202, at paras 66–67 as follows:

We were of the view that learned counsel's submission on this issue is inherently without merit. On account that the appellant is not an innocent carrier but was guilty of committing a classic case of wilful blindness in accepting the said bag P7 from Emmanuel without more, fingerprint examination to prove whether it was the appellant who had put the drugs inside the bag is indeed irrelevant. *The law is all about possession, knowledge and trafficking in the said drugs. The evidence adduced indicated that on all fours, the prosecution's job is done with or without the fingerprint evidence*.

Fingerprint evidence are not substantive evidence. Its evidentiary value is only corroborative. Its absence do not in any way create a gap warranting an adverse inference to be drawn against the prosecution. While its presence would inevitably strengthened the prosecution's case, its materiality, however, would assume less relevance where there are direct evidence available to implicate the appellant with the commission of the offence as here — see *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233. (Emphasis added.)

Decision at the end of the prosecution case

[77] Upon a maximum evaluation of the evidence, and for the reasons expressed above, I found that the prosecution had proven a prima facie case against both accused for trafficking and I called upon them to make their defence.

[78] After the three alternatives were explained to them, both accused elected to give sworn testimony.

THE DEFENCE CASE

[79] The first accused ('SD1') testified that before he was arrested he had usually gone fishing with the second accused ('SD2') and his other friends with the boat hired from SP4.

[80] SD1 said that at 6.40am on 27 September 2016, he left his house and brought with him a white Gerry can with a red cover. As he left his house, SD1 said he happened to see SD3 and SD4 and informed them that he was going fishing with SD2.

[81] SD1 said that on the way he stopped at the Petronas Lingkaran Dalam to fill up petrol and then proceeded to SD2's house. When SD2 entered the car driven by SD1 he put two fishing rods in the car boot and proceeded to SP4's house. Before reaching SD4's house, SD1 and SD2 stopped by a provision shop to buy some food and some water.

[82] When they arrived at SD4's house, the latter handed over the key to the boat and some petrol. SD1 then made payment of RM150 to SD4.

[83] SD1 and SD2 then proceeded to the jetty and brought along with them the Gerry can, two fishing rods, fish bait, the key to the boat and a polystyrene box.

[84] SD2 sat at the back and handled the outboard motor. SD1 said that he saw the life jackets in the front of the boat opened and one lying on top of the other.

[85] At 10am, they arrived at the first port where they fished for two to three hours before they departed for the second port which was under the Malaysia — Singapore Causeway Bridge where SD1 said he slept for one to two hours. SD1 then awoke and ate the food they had earlier bought.

[86] SD1 said that while they were fishing, a marine police patrol boat and a team of police headed by SP2 boarded their boat and conducted an examination. As a result, SP2 discovered a bag and found it to contain packets of food after which he and SD2 were brought together with the boat and exhibits to the marine police office and then to the police station.

[87] SD1 said it was at the time when the marine police patrol boat arrived that he vaguely or 'samar-samar', made out the image of a bag under the life jackets. At the time he said that he was at the back of the boat manning the outboard motor.

[88] SD2 testified that the night before his arrest on 27 September 2016, he contacted SD1 in order to go fishing at the weekend and asked him to find a boat for hire to go deep sea fishing. SD2 said that before that day he had often used the same boat to go fishing.

[89] On the morning of 27 September 2016, SD2 said that SD1 contacted him to go fishing and that the former came to his house to pick him up. SD2 said that he had packed two fishing rods and fish bait. SD2 and SD1 then proceeded to SP4's house to hire the boat and before that stopped at the provision shop not far from SP4's house to buy some food.

[90] When they arrived at SP4's house, SD2 alighted from the car and went to take some petrol and the key to the boat from SP4 after which they proceeded to the jetty.

[91] SD2 said he entered the boat and said that there were two life jackets and after SD1 got onto the boat, he started the boat engine and proceeded to the first port to fish.

[92] SD2 said that while at the first port, SD1 and himself fished from 8am until noon after which they rested under the causeway bridge. At around 2pm SD2 woke SD1 from sleep in order to go to the third port. SD2 said that at that time while under the causeway bridge, he saw that there was a bag under the life jacket but ignored it.

[93] SD2 said that not long after a Marine Patrol boat came there headed by SP2 and commenced examination on their boat. In the course of the examination, the said bag containing the packets of food containing the impugned drugs were found. SD1 and SD2 together with the exhibits and the boat were then brought to the marine police office and thereafter to the police station for further action.

[94] The defence also called two other witnesses. SD3 is the mother of SD1 and she testified that she saw him about to go fishing that morning. SD4 is a friend of SD1 and he too testified that he happened to meet SD1 that morning and that SD1 was going fishing.

DUTY OF THE COURT AT THE CONCLUSION OF THE TRIAL

[95] The duty of a trial court at the conclusion of the defence case is set out in s 182A of the Criminal Procedure Code ('the CPC') which imposes an obligation upon the court to consider all the evidence to decide whether the prosecution has proved its case beyond reasonable doubt.

[96] See also *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282 and also *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773.

[97] Aside from the above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence evidence is that as encapsulated in the time honoured decision of *Mat v Public Prosecutor* [1963] 1 MLJ 263, where it was held by Suffian J (as he then was) as follows:

> The position may be conveniently stated as follows:
>
> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt
>
> Convict.
>
> (b) If you accept or believe the accused's explanation
>
> Acquit.
>
> (c) If you do not accept or believe the accused's explanation
>
> Do not convict but consider the next steps below.
>
> (d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt
>
> Convict.
>
> (e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt
>
> Acquit.

[98] The approach in *Mat v Public Prosecutor* was judicially endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393.

ANALYSIS OF THE DEFENCE CASE

[99] The essence of the defence case is that they hired the boat merely for the purpose of going fishing on the day of the arrest. Besides that they had no other purpose for being in the boat out at sea on the day of the arrest.

[100] They said that they did not see the bag (P11(1)) containing the impugned drugs when they boarded the boat and it was only much later that they noticed the bag.

[101] They disavowed all knowledge of the said bag and its contents and said that as the boat was moored at a jetty which was not enclosed but openly

A accessible, someone else could have easily placed the said bag there. They also said that before they hired the boat, there was evidence that the boat was hired out to some other persons.

B **[102]** The accused persons had taken the boat from SP4 at around 6.40am on the day of their arrest. They were arrested at around 4.15pm. This meant that both accused were in the boat for approximately nine hours. The accused said however that they did not notice the bag until much later and only just before the marine police arrived.

C **[103]** The boat was in fact no more than a 'sampan' and from the photographs can be judged to be around ten to 12 feet long and approximately four feet wide. There was thus minimal space on the boat and this would have been even less with the presence of the polystyrene box, the Gerry can and the two life jackets plus the fishing rods.

D

[104] A perusal of the photograph P5(F) will give an indication of the approximate dimensions of the said boat. It can be seen that it was not a big boat by any means. It is improbable that neither accused noticed the said bag for so many hours on the boat and with such limited space on board.

E

[105] The defence contended that it was possible that the said bag containing the impugned drugs could have been left there by someone else because the boat was moored at an open jetty in an unrestricted area with access by all and sundry.

F

[106] However, according to SP4 when he rented the boat to the accused, he said that it was empty and there was nothing in the boat. He also said that he had never before seen the said bag. SP4 said that besides the life jackets, the other things shown to him were not his.

G

[107] With respect to the issue of knowledge, the defence submitted that the fact that both accused did not attempt to flee or to get rid of the said bag by throwing it overboard, indicated that they had no knowledge of the bag and its contents.

H

[108] Conduct of an accused is of course a relevant factor under s 8 of the Evidence Act 1950. Section 8 reads:

I

> 8 Motive, preparation and previous or subsequent conduct
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any

> fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[109] See also *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19. In assessing the relevancy of conduct it is however necessary to appreciate the prevailing circumstances at the time. Inferences made from conduct cannot be taken in isolation.

[110] In *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741, the apex court held:

> The appellant was confronted by the police at the arrival gate which is a tight and restricted area with hardly any room for the appellant to make a successful escape. The appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. Any attempt by the appellant to throw away or disassociate himself with the backpack would have been evidently noticeable. Further, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. Therefore, the appellant's docile conduct throughout the period did not infer an absence of knowledge of the drugs.

[111] Similarly here, both accused were in a small boat with an outboard motor in the open sea. There were no other boats nearby. Given these circumstances, should the accused persons or any one of them have attempted to plunge into the sea to try to swim, they would have been easily noticed and would not have got very far before the marine boat picked them up.

[112] Similarly, if they had tried to outrun the marine patrol boat with their 'sampan', it is fair to say that they would have been caught in no time by the marine boat.

[113] Any attempt to throw the said bag overboard would have been clearly noticed in broad daylight and the bag would in any event have been retrieved without much difficulty.

[114] Therefore given the situation that prevailed at the time, the omission of the accused persons to resort to the acts referred to above cannot of itself be relied upon to infer that they had no knowledge of the impugned drugs.

[115] The drugs found in the said bag was analysed to be methamphetamine weighing 5,496g nett. This amount is many times over the statutory minimum prescribed under s 37(da)(xvi) of the DDA. Common sense will dictate that the street value of such a large amount of drugs will be quite significant.

A **[116]** It is not in any way probable for any reasonable person to have left the bag containing a high value of drugs unattended in the boat moored in an open jetty easily accessible to others. Such an act will run a major risk of such a 'prized possession' being irretrievably lost.

B **[117]** The last place for anyone else to store something with the kind of weight and value the drugs would have attracted would be in a boat moored in an open area freely accessible to the public which could be hired out and taken out to sea at any time.

C **[118]** All the circumstances therefore pointed to the accused persons having possession and knowledge of the bag and the drugs contained in the said bag.

[119] The first accused testified that he went fishing three times a month with
D the second accused and with other friends of his. The obvious purpose for him in saying so was no doubt to portray that the activity was a common habit of his and therefore the fact that he was fishing on the day of arrest was not something unusual.

E **[120]** In fact, the crux of the defence case is that they did not know about the existence of the bag when they took the boat because their only intention that day in hiring the said boat was to go fishing. When they noticed the bag, they ignored it because they assumed it belonged to someone else.

F **[121]** During the course of cross-examination however, the first accused agreed when it was suggested to him that he had not told this to the police during investigations.

G **[122]** The response of the first accused when asked why not, was that the police had never asked these matters of him. The omission of the first accused to reveal the matters of such importance and therefore central to the defence would lay it open to the attack by the prosecution that the defence was an invention and afterthought. Indeed this was what was contended by the
H prosecution.

[123] Under the circumstances, I find that if the matters essential to the defence were true, it would stand to reason that the first accused would have informed the police without being prompted or asked. The justifiable
I conclusion from this omission is that the defence was a mere afterthought.

[124] The second accused testified that he normally went fishing on the weekends. However, when it was suggested to him by the prosecution that the

day of the arrest was a weekday, the second accused merely responded by insisting that that day was in fact a weekend.

[125] This denial by the second accused in the light of the uncontroverted fact that the day of arrest was in fact a weekday does not lend any weight to his credibility.

[126] The second accused testified that he first saw the bag containing the impugned drugs when the boat was under the bridge. He did not however react to this because he thought the bag probably belonged to the owner of the boat or that someone else had left it there.

[127] Yet under cross-examination, he admitted that he did not inform the police that he saw the bag and thought that it may have either belonged to the owner of the boat or someone else who had left it behind.

[128] If indeed this was true a reasonable person would have at the very first opportunity upon learning the contents of the bag contained illicit drugs would have alerted the police to this fact and accordingly distanced himself from any involvement or knowledge of the illicit contents.

[129] The testimony of SD3 and SD4 does not assist the defence in any way as they only state that they saw the first accused about to go fishing.

[130] While both accused may have been in a boat that day with fishing gear on board, the fact that a bag containing the impugned drugs was also in the boat under circumstances where the bag could not have failed to have been noticed, raises the inference that the purpose of both accused in the boat at that location that day was for a more sinister purpose.

[131] Therefore, although the accused persons had on board with them fishing rods, bait, and the polystyrene box, I find that this was a mere ruse employed by them in order to conceal their true motive for being out at sea in the said boat and that is to traffic in the impugned drugs.

DECISION

[132] For the reasons given above, I find therefore that the defence has failed to rebut on balance of probabilities the statutory presumption of trafficking under s 37(da) of the DDA.

[133] The defence had also failed to raise a reasonable doubt as to possession of the impugned drugs in respect of the charge. I accordingly convict both accused persons as charged.

[134] Before I passed sentence I drew the attention of learned counsel for both accused to the recent amendments to s 39B of the DDA and especially to sub-s (2A).

The amended s 39B of the DDA

[135] Section 39B of the DDA was amended vide the Dangerous Drugs (Amendment) Act 2017 (Act A1558) and came into effect on 15 March 2018 PU(B) 127. The amended s 39B reads:

> 39B Trafficking in dangerous drug
>
> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.
>
> (2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:
>
> (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;
>
> (b) there was no involvement of agent provocateur; or
>
> (c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and
>
> (d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.
>
> (2B) For the purposes of subsection (2A), 'enforcement agency' means —
>
> (a) the Royal Malaysia Police;
>
> (b) the National Anti-Drugs Agency;
>
> (c) the Royal Malaysian Customs Department;
>
> (d) the Malaysian Maritime Enforcement Agency; or

(e) any other enforcement agency as may be determined by the Minister.

[136] Learned counsel for the accused submitted that with respect to sub-s (2A), that there was no phrase 'and' or the word 'or' after para (a) whereas para (b) has the word 'or' after that.

[137] It was therefore submitted that para (a) stood alone while paras (c) and (d) were meant to be read together. It was further submitted that paras (b) and (c) were connected.

[138] Learned counsel went on to submit that since the court placed reliance on the statutory presumption of trafficking, this meant that there was no evidence of direct trafficking as envisaged under para (a) to sub-s (2A).

[139] Therefore as there was no evidence of buying and selling of dangerous drugs at the time when the accused persons were arrested, and para (a) stood alone, this court ought to exercise the discretion to pass imprisonment for life plus whipping.

[140] The learned DPP on the other hand submitted that while the conditions in (a), (b) and (c) were to be read disjunctively from each other, (d) must be read conjunctively.

[141] The attention of learned counsel for the accused persons were directed to the *Hansard* of 30 November 2017.

[142] In the relevant parliamentary debate, this was what the then Honourable Minister Dato' Sri Azalina said in response to a question posed:

> Yang Berhormat tanya saya tentang perkataan 'and' dalam hujung seksyen 39B(2A)(d). Dasar yang telah ditentulah ialah supaya perenggan (d) menjadi sesuatu yang kehendak kepada mandatori iaitu perlu dipenuhi sekiranya mahkamah ingin mempertimbangkan untuk menjatuhkan hukuman penjara seumur hidup. Dalam hal ini, (a), (b) dan (c) – (a), (b), (c) dibaca secara (sic) injunctive tetapi akan dibaca secara conjunctive dengan (d). Maknanya (d) itu adalah keperluan utama untuk hakim menggunakan kuasa budi bicara.

[143] Continuing in the same vein, the Honourable Minister continued:

> Kerajaan tidak bersetuju dengan penggantian perkataan 'and' dengan perkataan 'or' di akhir frasa (2A)(c). Diperhatikan bahawa terletaknya perkataan 'and' di akhir fasal (2A)(c) bermaksud mahkamah hendaklah mengambil fasal (2A)(d) secara bersama atau conjunctive dengan salah satu daripada (2A)(a), (b) atau (c) atau mana-mana kombinasi daripada ketiga-tiganya. Dalam kata lain, pertimbangkan

terhadap fasal (2A)(d) adalah wajib dalam setiap kes di mana mahkamah membuat pertimbangan sama ada hendak menjatuhkan hukuman penjara seumur hidup dengan sebatan.

[144] *Hansard* also reveals the following, also from the same Minister as follows:

> Kerajaan tidak bersetuju dengan cadangan untuk mengeluarkan perkataan 'only' dalam fasal (2A) dan juga tidak bersetuju dengan pindaan hukuman yang dicadangkan. Kerajaan berpandangan bahawa pengeluaran perkataan 'only' tersebut akan membuka luas faktor-faktor yang boleh diambil kira oleh mahkamah dalam memutuskan hukuman. Keadaan ini juga akan membawa kepada situasi ketidakseragaman dalam hukuman sebagaimana berlakunya sebelum tahun 1983.

[145] Finally, the Honourable Minister also said:

> Diperhatikan di sini bahawa faktor-faktor (a), (b) dan (c) berkaitan dengan kesalahan spesifik yang telah pun dilakukan oleh tertuduh. Hanya factor (d) yang berkaitan dengan satu kelebihan yang boleh diperolehi agensi penguatkuasaan dalam usaha mengendalikan pengedaraan dadah. Oleh itu, factor (d) harus wajib dipertimbangkan oleh makhamah jika niat dan semangat di sebalik pindaan ini hendak dizahirkan iaitu memperkasa agensi penguat kuasa dalam memerangi pengedaran dadah dan melindungi kepentingan masyarakat.

[146] A plain reading of s (2A) will indicate that paras (a)–(c) are meant to be read disjunctively while para (d) must be read conjunctively with either of the requirements in (a)–(c). The phrase 'and' just before para (d) makes this clear. The requirement under para (d) is therefore mandatory.

[147] It is also clear that the phrase 'only' in the opening words of s (2A) means the court can only consider the matters enumerated in paras (a)–(d) in deciding whether to exercise the discretion. The *Hansard* references further reinforces this view.

[148] Having heard submissions from respective parties, I found nothing in the evidence to suggest that the requirement under para (d) was satisfied.

[149] There was therefore no evidence to show that the accused persons had assisted an enforcement agency in disrupting drugs trafficking activities.

[150] Having considered the submissions of all parties, I found that there was no material upon which I could have exercised such discretion. I therefore sentenced both accused to be hanged by the neck until they were dead.

Both accused convicted as charged and sentenced to death.

Reported by Ashok Kumar